In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1280

CHARLES M. OERTLE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In 1957, following the death of his father and brother, petitioner Oertle took charge of the family business, Oertle Wholesale Drug Company, a retail distributor of various types of merchandise, including jewelry, luggage, and other articles subject to the retail dealer's excise tax imposed by Sections 4001, 4021, and 4031 of the Internal Revenue Code of 1954 (R. 215, 450, 514, 622, 635-636).[1] Petitioner Mc-

[1] "R." refers to the transcript of record filed in the court of appeals.

Cague was employed by the company during 1957, 1958, 1959, and until February 1960; he had various accounting duties, including the preparation of quarterly excise tax returns (R. 204-205, 522, 618-622, 629, 637). On January 14, 1964, a 17-count indictment was returned charging petitioners jointly with willful attempts to evade [2] the above-mentioned excise taxes by the filing of fraudulent quarterly excise tax returns during 1958 and 1959, and in January 1960, and charging petitioner Oertle with the same offense with respect to the returns filed thereafter, up to and including the return for January 1962. After a jury trial, both petitioners were convicted on all counts of which they were respectively charged [3] (R. 1-11, 13-14, 17-19).

The evidence was in substance as follows. The company used about twenty cash registers, three of which were located in departments engaged in selling merchandise subject to the excise tax. When such merchandise was sold, the cash register made a record of the sale price, the state sales tax, the federal excise tax, and the total, and tabulated these figures in four separate totals on a tape which was removed at the end of the day (R. 514-515, 636). These separate totals, from all the cash registers, were then recorded on summary sheets and were thereafter transferred to journals or ledgers (R. 515). During 1956, the

---

[2] In violation of Section 7201 of the Internal Revenue Code of 1954.

[3] Except for Count Three (R. 2), which was dismissed by the court because of a defect resulting from a clerical error (R. 96).

company filed quarterly excise tax returns in which the tax reported agreed with the tax figures on the company's books (R. 628; Govt. Exh. 66). In 1957, and until McCague left in February 1960, the returns reported only part of the taxes recorded in the books, ranging from about 20 to 68.3 percent (R. 526-527). After McCague left, and until the end of the period covered by the indictment, the returns reported 68.3 percent of the tax shown on the books (R. 525).

A certified public accountant who worked for the firm in 1958 and 1959 testified that she gave McCague the excise tax figures shown on the books, and knew of no reason why those figures was not reported on the returns (R. 454). A public accountant, Dicesare, was hired as a bookkeeper about the time when McCague left, and he took over the task of preparing the quarterly excise tax returns (R. 511, 522). At a meeting with Oertle and McCague in January or February 1960, Dicesare asked why the total excise tax as shown on the books was not being paid to the government, and petitioners told him that on the basis of a "survey" they had arrived at the figure of 68.3 percent, and Oertle directed him to use that amount (R. 522-523, 633). Dicesare never saw any such "survey" and never found any justification for such a procedure (R. 524). He at one time asked Oertle when the difference would be paid to the government, and Oertle replied "that he paid more taxes than anybody in town, and the remainder was not going to be paid" (R. 526). No evidence was intro-

duced at the trial as to what the above-mentioned "survey" consisted of, or upon what it was based[4] (cf. R. 628, 635, 642).

Petitioners attempted to show that they in fact overpaid the excise taxes (R. 717-718, 756, 765-766). Dicesare testified that his recalculation of the correct taxes, based on invoices, produced almost exactly the same result as that shown on the books (R. 531-532). Although neither petitioner testified at the trial, evidence of their respective reputations for good character was introduced (R. 743-774).

With reference to the evidence of good character, the trial court instructed the jury as follows (R. 902):

> Evidence that the defendants were persons of good character and had a good reputation in the community where they lived prior to the alleged commission of the offense charged in the indictment has been introduced. Such evidence is competent and is to be considered in connection with the other evidence in the case. Such evidence is admitted upon the theory that a man bearing a

---

[4] The evidence (summarized in Govt. Exhs. 102-A, 102-B, and 102-C) showed the following discrepancies between the excise taxes as shown on the company's books and as reported on the quarterly returns:

Year	Per Books	Per Returns	Additional Tax Due
1957	$ 21,042.91	$ 8,510.29	$12,532.62
1958	$ 35,306.35	$ 12,535.65	$22,770.70
1959	$ 50,753.19	$ 27,832.42	$22,920.77
1960	$ 43,117.71	$ 29,824.30	$13,293.41
1961	$ 38,244.17	$ 25,485.42	$12,758.75
Totals	$188,464.33	$104,188.08	$84,276.25

> good reputation for being an honest and law-abiding citizen is not as likely to commit a crime as one who doesn't bear such a reputation. Of course, a good reputation is not a defense to the charge made by the Government in this case, but it may be sufficient to generate a reasonable doubt as to the guilt of the defendant, and it is a circumstance to be weighed by the jury in connection with all of the other evidence in the case.

Petitioners objected to the court's failure to give their requested instructions concerning evidence of good character (R. 910, 911). They asked the court to instruct that character evidence, standing alone, may create a reasonable doubt as to guilt (R. 960, 961-962). The court, however, refused to so instruct.

The sole issue presented by petitioners (Pet. 5-6) relates to the adequacy of the instructions given regarding the character evidence which was introduced. They contend that there is a conflict among the circuits concerning how a federal court jury should be instructed with reference to evidence of good character, and that this Court should now undertake to resolve the conflict. That contention lacks substantial merit, and, accordingly, no further review is warranted.

By its decision in the instant case the Tenth Circuit has merely retreated from a minority position, discarding its prior view (see, *e.g.*, *Miller* v. *United States*, 120 F. 2d 968; *Petersen* v. *United States*, 268 F. 2d 87) that an instruction concerning character evidence "standing alone" must always be given and joining the almost unanimous view that such an instruction need be given only where the particular cir-

cumstances seem to require it. This Court has frequently denied certiorari in cases where review of this issue was sought,[5] and no reason appears for adopting a different course here.

In *Edgington* v. *United States*, 164 U.S. 361, the Court clarified the law as to instructions concerning evidence of good character. In that case, the trial judge had told the jury, in effect, that they should consider the character evidence only if the rest of the evidence created a reasonable doubt of defendant's guilt (*id.* at 365). This Court, however, rejected the idea that character evidence should be relegated to such an inferior position, stating that "the decided weight of authority now is that good character, when considered in connection with the other evidence in

---

[5] See, most recently, *Black* v. *United States*, 309 F. 2d 331 (C.A. 8), certiorari denied, 372 U.S. 934. See also *Moore* v. *United States*, 254 F. 2d 213, 221 (C.A. 5), certiorari denied, 357 U.S. 926; *Poliafico* v. *United States*, 237 F. 2d 97, 114 (C.A. 6), certiorari denied, 352 U.S. 1025; *Gariepy* v. *United States*, 220 F. 2d 252, 261 (C.A. 6), certiorari denied, 350 U.S. 825; *Boehm* v. *United States*, 123 F. 2d 791, 812 (C.A. 8), certiorari denied, 315 U.S. 800; *Nash* v. *United States*, 54 F. 2d 1006, 1007 (C.A. 2), certiorari denied, 285 U.S. 556; *Haffa* v. *United States*, 36 F. 2d 1, 5 (C.A. 7), certiorari denied, 281 U.S. 727; *Baugh* v. *United States*, 27 F. 2d 257, 261 (C.A. 9), certiorari denied, 278 U.S. 639; *Scheib* v. *United States*, 14 F. 2d 75, 79 (C.A. 7), certiorari denied, 273 U.S. 701; *Kreiner* v. *United States*, 11 F. 2d 722, 726 (C.A. 2), certiorari denied, 271 U.S. 688; *Kaufmann* v. *United States*, 282 Fed. 776, 785 (C.A. 3), certiorari denied, 260 U.S. 735; *LeMore* v. *United States*, 253 Fed. 887, 894 (C.A. 5), certiorari denied, 248 U.S. 586; *Smith* v. *United States*, 305 F. 2d 197 (C.A. 9), certiorari denied, 371 U.S. 890; *United States* v. *Passero*, 290 F. 2d 238, 246 (C.A. 2), certiorari denied, 368 U.S. 819.

the case, may generate a reasonable doubt" (*id.* at 366). Then, obviously for the purpose of emphasizing why it was error to relegate such evidence to an inferior or secondary position, the Court added (*ibid.*): "The circumstances may be such that an established reputation for good character * * * would alone create a reasonable doubt, although without it the other evidence would be convincing." Although the *Edgington* opinion gave no indication that the jury should or even properly could be *instructed* as to the possible weight they might give to character evidence "alone", this Court in *Michelson* v. *United States*, 335 U.S. 469, 476, merely in the course of a general discussion in a case where the form of instruction was not in issue, remarked (with reference to *Edgington*) that "this Court has held that such testimony alone, *in some circumstances*, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury *in a proper case* should be so instructed." (Emphasis added.)

In the instant case, the Tenth Circuit adhered to the two foregoing opinions of this Court, stating that a jury need not be given a "standing alone" instruction in every case, but only where the "circumstances of a particular case may require it" (Pet. 18). It observed further that it would "not attempt here to anticipate" what circumstances might require the instruction, beyond saying that it should be given "when an accused presented only evidence of good character" (*ibid.*). It concluded that the instruction was not required here since petitioners "did not rely solely on good character evidence" (*ibid.*). In so ruling, the

court followed *Edgington* and *Michelson*, as well as the virtually unanimous view of the other circuits, which generally reject the "standing alone" type of instruction entirely,[6] except where the circumstances of the particular case persuade the court that such an instruction should have been given.[7] This rule has

---

[6] The "standing alone" type of instruction has been rejected, at least in the absence of unusual or particular circumstances, by six other circuits. See *United States* v. *Lowenthal*, 224 F. 2d 248, 249 (C.A. 2); *Hoback* v. *United States*, 284 Fed. 529, 533 (C.A. 4); *Moore* v. *United States*, 254 F. 2d 213, 221 (C.A. 5), certiorari denied, 357 U.S. 926, and *LeMore* v. *United States*, 253 Fed. 887, 894 (C.A. 5), certiorari denied, 248 U.S. 586; *Poliafico* v. *United States*, 237 F. 2d 97, 114 (C.A. 6), certiorari denied, 352 U.S. 1025; *Winter* v. *United States*, 13 F. 2d 53 (C.A. 8), *Sunderland* v. *United States*, 19 F. 2d 202, 215 (C.A. 8), and *Black* v. *United States*, 309 F. 2d 331 (C.A. 8), certiorari denied, 372 U.S. 934; *Smith* v. *United States*, 305 F. 2d 197, 205-207 (C.A. 9), certiorari denied, 371 U.S. 890. The only circuits, as far as we can determine, where the instruction seems to have been regarded as mandatory in all cases are the Tenth Circuit (which now has abandoned that position) and the District of Columbia Circuit, having so concluded in *Villaroman* v. *United States*, 184 F. 2d 261, 263.

[7] In the ordinary case the courts seem inclined to approve the rejection of the instruction on the ground that it would be confusing to the jury. For example, the Seventh Circuit rejected the "standing alone" instruction in *Allen* v. *United States*, 4 F. 2d 688, 695 (see also *Haffa* v. *United States*, 36 F. 2d 1, 5 (C.A. 7)), but required it in *United States* v. *Donnelly*, 179 F. 2d 227, 233, because it was a "close case" depending on whether the jury chose to believe the defendant or a self-professed accomplice. Similarly, the Ninth Circuit rejected the instruction generally and on the facts before it in *Smith* v. *United States*, 305 F. 2d 197, 205-207, but conceded that it should be given in an appropriate case, *e.g.*, "If, for example, some trial incident * * * could lead the jury to be-

proved workable in practice, and no need for reexamination by this Court exists.

Since the decision below is in accord with the virtually unanimous view of the other circuits, and is in accord with the teachings of this Court, there is no occasion for further review. Thus, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MITCHELL ROGOVIN,
Assistant Attorney General.

JOSEPH M. HOWARD,
JOHN M. BRANT,
Attorneys.

MAY 1967.

---

lieve that testimony of good character is only 'make-weight' and could not, of its own force, create a reasonable doubt" (*id.* at 206).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 263801 914